EDITORIAL NOTES.

By W. D. L.

The Standing of the Interstate Commerce Commission Before the Federal Courts.

The Interstate Commerce Commission has made its annual report to Congress. This report, besides reviewing the labors of the Commission for the past year, discusses their own important decisions and the decisions of the Federal courts affecting the Commission. The most important decisions reviewed are those of the Federal courts, which define the way in which the Courts will hereafter regard the rates fixed by the Commission. This whole matter is in a very unsatisfactory condition. There is a rapidly growing antagonism between the Courts and the Commission, arising out of the refusal of the Court to enforce the orders of the Commission. At least two cases[1] in the Circuit Court have decided that the order of the Commission, when it sought to have the order enforced in the Circuit Court, was little more than advice to the Court from a body supposed to be skilled in questions of railroad rates, and that the Court would enforce the order or not only after going into the whole case. Thus, in Kentucky and Indiana Bridge case,[2] the Court appointed a master to investigate the merits, and it is asserted in the opinion that the master went into the case much more elaborately than the Commission. We doubt, however, whether he was so well qualified to judge the "facts." But that the Courts, in the present state of the law, have the right, should they see fit, to go into the merits of the whole question, *de novo*, when asked to enforce the

[1] Kentucky Bridge Co. *v.* L. & N. R. R. Co., 37 Fed. Rep., 567; Int. Com. Com. *v.* Lehigh Valley R. R. Co.; see article on "Interstate Commerce Commission Before Federal Courts," by Crawford Hening, in 31 American Law Register and Review, 156.

[2] *Supra.*

order of the Commission, would, even without these express decisions, be too clear for argument.

The Act says: "And the said Court shall proceed . . to do justice in the premises; and to this end shall have power to direct and prosecute in such mode and by such persons as they may appoint all such inquiries as the Court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the report of said Commission shall be *prima facie* evidence of the matters and things therein stated."[1] That the Court meant the judges to go behind the facts as reported by the Commission only when they had reason to entertain a doubt of their accuracy may be admitted. But it is certain, from the language of the Act, that the circuit judges were to be governed in the extent of their inquiries into the matter of the Commission's report by their own opinion as to what would aid them in arriving at a *just judgment.*

The practical working out of this theory of the Interstate Commerce Act is far from satisfactory. As the defendants feel that the hearing before the Commission is nothing more than a preliminary skirmish, they fail to pay much attention to the proceedings, relying on their ability to marshal their evidence before the Court. The Commission is placed in a more or less ridiculous light, and the Court, by appointing "masters" to investigate facts already found by the Commission, throw away the possibility of the good which was expected to follow from having disputed questions of the proper railroad rates investigated by a trained body of experts. Besides all this, the delay incident on a dual hearing of the "facts," often involving long and complicated investigations, makes the decision of the Court come so late as to be practically useless, or unsuited to the changed state of facts.

There are two classes of changes which can be made looking toward an improvement in the usefulness of the Commission. In the first place the Commission can be made a court whose decisions would be final, with appeals

[1] Stats. at Large, 385 (1887).

to the Supreme Court of the United States in a limited number of cases. This would end, forever, any question of their dependence on the circuit courts. As we consider there is one almost insuperable objection to making the Commission a Court, which objection we will consider further on,[1] let us see what can be done to increase the Commission's efficiency without making it a court.

There are four possible things which Congress can do with the report of a Commission, and still have it fairly argued, though in one case we believe wrongly, that the Commission is still a commission and not a court. In the first place Congress can do as they have done:

I. *Make the Report of the Commission Prima Facie Evidence only of the Facts Found.*—In this case the Commission is certainly not a court. A court is a body which conclusively, except on appeal in the same proceedings to a higher tribunal, applies the law to particular facts. We say conclusively; that is, no other court of the sovereignty can question its application of the law when either or both of the parties in a case presenting the same (not similar) facts comes before them.

II. *Have the Order of the Commission Conclusive as to the Justness of the Rate Charged According to the True Intent and Meaning of Congress.*—This, we believe, would be making the Commission a court pure and simple. They would find the facts—one of the duties of a court—and apply the law to those facts. That is, they would interpret what Congress meant by a "reasonable and just" charge under the facts before them. This way, then, could not be adopted without changing the character of the Commission.[2]

[1] *Infra*, 270.

[2] It is interesting here to note the opinion of Judge JACKSON. He says, in the Kentucky and Indiana Bridge Case, 37 Fed. Rep., 316, ". . . this Court is not the mere executioner of the Commission's order or recommendation, so as *to impose upon the Court a non-judicial power.*" That Congress cannot require of judges non-judicial functions goes without saying: Hayburn's Case, 2 Dal., 409. But we do not perceive why courts which daily carry out the decisions of courts in other States, or decide cases in which orders of executive officers have an important

III. *Have Congress Declare that the Rate Ordered by the Commission was the Legal Rate.*—This would be in effect saying that the words "just and reasonable" in § 1 of the Act meant nothing, and that the rate to be established by the Commission was the rate.

Two objections to this instantly occur. In the first place, it may be an unwarranted delegation of the legislative power. How far Congress can delegate legislative power is a mooted question. Under any circumstances, we can at least say that Congress can only delegate the power of legislation over those subjects local in their nature, as the power of local legislation for the District of Columbia or the Territories. Whether they can do this may be doubted. At any rate there can be no further delegation. Interstate commerce is not local in its nature. True, the particular rates between A and B depend, in part, on the knowledge of local facts. But they are not solely dependent upon such facts. The rate of transportation all over the country must also be taken into consideration. The particular rate can only be fixed with a knowledge of local conditions in the light of the general facts of the conditions of transportation.

The second objection is also fatal to the adoption of this plan. Congress can fix no rate of charge, either directly or through the Commission, which would be so low as to deprive the owners of their property without compensation. This, we believe, would be the opinion of the majority of the Supreme Court. It is certain to be the opinion of some of the members.[1]

There remains, therefore, but one other way in which we can suppose Congress to increase the value of the Com-

bearing, should not "apply the law" to the case of a carrier who had disobeyed the order of a Commission whose findings, they being a Court, were conclusive as to the law. In other words, we do not see why the application of law to carriers should not be divided between two courts—one to apply the law to determining the proper rate, and the other determining what should be done in case a carrier disobeyed the legal rate.

[1] See article "Can Prices be Regulated by Law," and cases there cited; page 9, January number AMERICAN LAW REGISTER AND REVIEW (1893).

mission's report before the Courts without making the Commission a court.

IV. *Have the Report of the Commission, on the Facts of the Case Conclusive Evidence of those Facts, Leaving the Court Vary the Report of the Commission in respect of Orders made and Rates of Fare or Freight Fixed, if such Rates are not Reasonable Rates on the Facts Reported.*

First: Would this plan impose upon the judges of the Circuit Courts other than judicial duties? *Second:* Would it make the Commission a Court?

To answer these questions, let us put the case which at first glance would seem to show that the judges of the Circuit Court would act merely as executive officers if the facts reported by the Commission were the only "facts" in the case of which the Court could take cognizance. Suppose the order of the Court was attacked collaterally. As, for instance, that the defendant should apply for an injunction to restrain the officers of the Court from selling his property to pay the fine for not obeying the order of the Court, on the ground that the findings of the Commission being, as a matter of fact, erroneous, the order of the Court deprived him of his property without compensation. Or suppose this question to have been raised before the Court before their order was made establishing the rate. The Court would either have to satisfy themselves as to the correctness of the findings of the Commission, which, by law, they were forbidden to do, or accept the report as to facts as conclusive. This would be giving to the acts of the Commission full faith and credit. It would be treating the Commission, in so far, as a court is treated. But it would not make the Commission a court. The Commission, in making the order, apply law to facts. Here again, in so far as they act, they act as a court acts. The test of whether they really are a court is whether the courts of the States and United States are bound by their application of the law to the facts when the same case between the same parties comes before them in the enforcing of the order, or when the particular decision is attacked collaterally. To have a court, one must have a decision

valid to all the other courts of the sovereignty, except it be on an appeal to a higher tribunal. Should Congress make the findings of fact of the Commission conclusive, it would simply be forcing the court to do what it was probably intended they would do of their own motion, say to a carrier who refused to carry out the mandate of the Commission, and complained of the Commission's findings of fact: "You had your day to set forth your facts. The Commission have looked into all the evidence, and reported the existence of this and that. We will take the existence of this and that to be as the Commission report them." It would simply be making the Commission permanent "masters" of the Court to examine and report on a particular class of questions.

The Court being the final arbiter on the rate, there would be no question as to whether the carrier by the rate has been deprived of his property without compensation. That question will be conclusively presumed, if the decision is attacked collaterally, to have been raised and decided in the negative. It would make the persons who decided the law different from those who investigated the facts, which is always an advantage. If the judges did not feel that enough facts had been reported to enable them to reach a just conclusion they should have the power to return the case to the Commission, with the direction to extend their investigations. It would overcome the great danger which confronts us if we make the Commission a Court, and appoint its judges for life, making its decisions conclusive; namely, that the rights of property which owners of railroads have should be sacrificed to supposed public expediency. If a judge tries and condemns criminals year by year he begins to think all the world criminal. This is one of the important reasons, it seems to us, for jury trials. So, if a railroad commission does nothing else but cut down exorbitant charges of railroads they will begin to think that all railroad charges are too high and should be cut down. In other words, they will become prejudiced against a party whose like often offends, and who would not be in

Court unless the shipper thought the charges were too high; just as the accused would not be indicted unless those representing the Commonwealth thought him guilty. Motives of public expediency should never permit a commission or Court to order a lower rate of charge than would insure a fair rate of profit on the money invested, which has not been expended foolishly. If the public want lower rates of transportation than this they should buy out the owners of the railroads. Let us hope that the Supreme Court will determine that it is unconstitutional to legislate them out of their property by reducing the rates so low that a fair return from investments cannot be made.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the following month].

THE LAW AND PRACTICE OF INTERNATIONAL EXTRADITION BETWEEN THE UNITED STATES AND THOSE FOREIGN COUNTRIES WITH WHICH IT HAS TREATIES OF EXTRADITION. By JOHN G. HAWLEY. Chicago: Callaghan & Co., 1893.

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THE PRINCIPLES OF THE AMERICAN LAW OF CONTRACTS AT LAW AND IN EQUITY. By JOHN D. LAWSON, B.C.L., LL.D. St. Louis: The T. H. Thomas Law Book Co., 1893.

A TREATISE ON WILLS. By THOMAS JARMAN, Esq. The Fifth Edition, by LEOPOLD GEORGE GORDON ROBBINS, Esq. Sixth American Edition, by MELVILLE M. BIGELOW, LL.D. Two Vols. Boston: Little, Brown & Co., 1893.

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THE RAILROADS AND THE COMMERCE CLAUSE. By FRANCIS COPE HARTSHORNE. Philadelphia: University of Pennsylvania Press, 1893.

A TREATISE ON THE ADMISSIBILITY OF PAROLE EVIDENCE IN RESPECT TO WRITTEN INSTRUMENTS. By IRVING BROWNE. New York: L. K. Strouse & Co., 1893.